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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL VENTURA, Defendant and Appellant.	B162679 (Los Angeles County Super. Ct. No. NA027358)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and Joseph P. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Miguel Ventura (Ventura), also known as Jose Luis Carrasco, pleaded no contest in 1996 to a charge of selling controlled substances (Health & Saf. Code, § 11352, subd. (a)).[1] On February 7, 1996, the trial court suspended the imposition of sentence and imposed three years of formal probation on the condition that Ventura serve 180 days in county jail. At that time, Ventura was awarded credit of 45 days, of which 31 were for actual days in custody and 14 were conduct credits.

In 1997, Ventura's probation was revoked and a bench warrant for his arrest issued. Ventura was arrested on September 10, 2002. On November 1, 2002, the trial court conducted a formal probation violation hearing and found Ventura in violation of the terms of his probation. The trial court imposed the mid term sentence of four years and awarded Ventura a total of 259 days of custody credits, of which 173 were for days in actual custody and 86 were conduct credits. Ventura appeals.

We appointed counsel to represent Ventura on appeal. After examination of the record, counsel filed an opening brief summarizing the facts and proceedings below. He presented no argument for reversal, but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Ventura's counsel advised him that he had 30 days within which to personally submit any contentions or issues he wished this court to consider. On February 19, 2003, we advised appellant that he had 30 days within which to file a supplemental brief. No response has been received to date.

In the course of our review, this court determined that the record raised potential issues concerning presentence custody credits and the assessment of fines. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1155, 1157 (*Talibdeen*) [erroneous omission of penalties mandated by Health & Saf. Code, § 11372.5, subd. (a), Pen. Code, § 1464, subd. (a), and Gov. Code, § 76000, subd. (a), may be raised on appeal]; *People v. Scott* (1994) 9 Cal.4th 331, 354 [unauthorized sentence may be corrected at any time]; *People*

[1] We take judicial notice of the superior court file and of the probation reports included with the record on appeal.

v. Acosta (1996) 48 Cal.App.4th 411, 428, fn. 8 (*Acosta*) [incorrect award of presentence custody credits is a jurisdictional error that may be corrected at any time].) At our request, the parties submitted supplemental letter briefs addressing these subjects.

Under Penal Code sections 4019 and 2900.5, defendants who are sentenced to terms of imprisonment are entitled to credits against that sentence for the number of days they spent in custody prior to sentencing on proceedings related to the same conduct for which they have been convicted, and, if they are statutorily eligible, for work performance and good behavior. The credits to which the defendant is entitled are calculated by the trial court at sentencing. (Pen. Code, § 2900.5, subd. (d).) In the present case, Ventura appears to have been in custody twice—once from his February 7, 1996 arrest to a date later in 1996 when he was either released or deported; and again in 2002 prior to sentencing.

At the November 1, 2002 probation revocation and sentencing hearing, the trial court, aware of its duty to determine the number of days Ventura had been in custody on this matter, became concerned about the dearth of custody information even before concluding that Ventura had violated the terms of his probation. Before the hearing began, the trial court reviewed a probation report submitted to the trial court in October 2002. That report stated that in 1996 Ventura had "served 180 days in county jail" as a condition of probation and that "[f]ollowing his release from custody, he was apparently deported . . . ." The author of that report, deputy probation officer Gail Palaeologus (Palaeologus), was the sole witness at the November 1, 2002 hearing to establish that Ventura had violated the terms of his probation.

Palaeologus was asked at the probation hearing whether Ventura was deported "straight from county jail on this case." She responded, "My information in regards to him being deported is what he told me. So I don't even know that he had been deported." When asked if Ventura had told her when he was deported, Palaeologus answered that she "assumed it was when he was going to be released from custody after doing his county jail time."

The trial court interjected, "Just a minute. You have no records of the exact date when he was taken into custody by the United States Immigration and Naturalization Services [*sic*]? You have nothing like that?" Palaeologus said she had no such information and admitted, in response to the court's questions, that she had no record of when Ventura was released from county jail. Palaeologus was only able to tell the court that the "CII rap sheet"—not in the record on appeal—indicated that deportation proceedings began on March 8, 1996.

After the court ruled that Ventura had violated his probation, the court asked counsel whether it should delay the sentencing hearing. Both counsel requested immediate sentencing.

The trial court selected the term of imprisonment and then asked defense counsel what presentence custody credits should be awarded. The prosecutor and defense counsel immediately disagreed about the number of days Ventura had been in custody in 2002. The prosecutor noted that although Ventura was arrested on September 10, 2002, he was released on his own recognizance. Defense counsel responded, "I believe the first date he appeared back here in this court was sometime right around September 11th or 12th. So I don't believe—I believe he was immediately taken. Upon his taking into custody, I believe he was immediately taken here." The prosecutor said, "Then he may indeed have been in custody since that time, but on the felony case."[2] The court said, "Well, we're speculating," and the prosecutor said, "I don't know." Defense counsel concluded, "[I]t's my belief that is what my notes indicate that he was picked up on the 10th and brought here to court on the 11th."

The court then asked defense counsel what the total credit award should be. Defense counsel requested a total of 259 days of credit. The trial court asked defense

[2] This "felony case" appears to be a charge of failing to stop at the scene of an accident (Veh. Code, § 20001) for which Ventura was arrested and released on his own recognizance on September 10, 2002.

counsel to "break it down [by] actual and good time because that's what the minute order has to show."

The trial court then began to express its concerns about the presentence custody credits for Ventura's 1996 term in custody, observing that if Ventura was deported, "He doesn't get credit for a whole 180 days that he was sentenced to. He was in another country." The court explained, "You only get credit for the time you serve, the way I understand it. [¶] For example, if we do it right, a lot of people get out a lot earlier. If we found the date they're actually released, they're only entitled until the time they were released, even though the sentence was, let's say, a year in the county jail, but we don't frequently go to the trouble to find out."

Defense counsel told the court, "It's not a workable system to do it that way." The court responded that Ventura is "only entitled to the credits up until he gets deported," and commented, "What I need to know is the day he was out of the country. If the P[ublic] D[efender] wants to challenge that, that's fine, but I don't think I can give somebody credit for time he wasn't in custody in the United States jail."

After a delay for other matters, the court resumed the sentencing hearing by asking defense counsel for a calculation of the credits to which Ventura was entitled based on the date of his deportation. Defense counsel responded that he knew only that on March 8, 1996, Ventura was "in contact" with the Immigration and Naturalization Service, and that "we have no way of knowing if that is the actual date that he was actually deported from this country, if that was the date of the first contact, if he was then held for months or weeks or after that." The court asked whether to delay sentencing to allow identification of the date of deportation, but defense counsel said no and reiterated his request for 259 days of custody credit.

The court asked how counsel calculated 259 days of credit without knowing when Ventura was deported. Defense counsel responded that regardless of the date of release or deportation, Ventura was entitled to custody credits for the full period for which he was sentenced to county jail. When asked for authority to support this position, defense

counsel responded, "That's the system. That's how we do it." The court asked counsel—a deputy public defender—whether his office's appellate division could assist with the matter, but he said he doubted the appellate division would help because the division would not deem this "an important enough issue."

The court then asked the prosecutor about custody credits, and he replied, "I'm not going to oppose it [the defense request] because I don't think we can really determine what the time was. I doubt that the jail has records going back to '96." He said he did not know whether Ventura was deported on or near March 8, 1996 or whether the date might signify only a "deportation hold." The prosecutor said, "It may have been that he was retained in county jail for a time after that. . . ."

The trial court then abandoned its attempt to ascertain the number of actual days Ventura had been in custody and said, "We'll give him 173 plus []86 good time. What's proposed by Mr. Lesser [defense counsel], I will accept it, 259 days credit."

At sentencing, the trial court must determine the actual number of days a defendant has been in custody on that matter, then calculate the number of days of conduct credits, if any, to which the defendant is entitled. (Pen. Code, § 2900.5, subd. (d) ["It shall be the duty of the court imposing the sentence to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section"]; *People v. Montalvo* (1982) 128 Cal.App.3d 57, 62 (*Montalvo*) ["it is the business of the trial court, and not the appellate court, to determine the credit to which the defendant is entitled by reason of pre-sentence confinement"].) Penal Code section 2900.5, subdivision (d) (hereafter Section 2900.5(d)) is intended "to provide for determination of presentence credits at the time of sentencing, to assign the task of resolving factual and legal disputes to the sentencing court, and to insure an adequate record for appellate review and administrative application." (*People v. Blunt* (1986) 186 Cal.App.3d 1594, 1601 (*Blunt*).)

Although the fact-finding and computational duties rest with the trial court, others must provide information so that it "has the capability of determining the facts from

which the credit may be computed." (*Montalvo*, *supra*, 128 Cal.App.3d at p. 62.) "The initial determination of the number of days of actual custody before sentencing is the responsibility of the sheriff, the probation officer, or some other appropriate person who typically includes this information in the probation report." (*People v. Jack* (1989) 213 Cal.App.3d 913, 917; see also Cal. Rules of Court, rules 4.310 and 4.472 [trial court "shall direct" the appropriate officer "to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time prior to the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit"].) Probation officers are required to include in felony presentence reports "[d]etailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period(s) of custody; the existence of any other sentences imposed on the defendant during the period of custody; [and] the amount of good behavior, work, or participation credit to which the defendant is entitled . . . ." (Cal. Rules of Court, rule 4.411.5, subd. (a)(10).) The California Supreme Court has observed that this information is readily available. "Inasmuch as such computations [of custody credits] are made routinely by the jail administrator . . . that officer can readily provide the court with the necessary computation and/or records." (*People v. Sage* (1980) 26 Cal.3d 498, 509.)

Attorneys, as officers of the court, are also responsible for ensuring that custody credits are awarded properly. "Defense counsel has a duty to ensure the defendant receives all the credits the law allows. The prosecutor has a duty to ensure the defendant does not receive too many credits. These duties are ethical responsibilities imposed on all criminal litigators." (*Acosta*, *supra*, 48 Cal.App.4th at p. 428, fn. 9.)

Here, insufficient information was presented to the trial court to permit it to make the findings and calculations required by Section 2900.5(d). The probation officer admitted that she had assumed that Ventura fully served his 180-day county jail sentence in 1996 and that she did not know whether or when Ventura had been deported. Both counsel claimed it was impossible to determine the dates Ventura had been in custody

and opposed the trial court's suggestion of a continuance to secure the information, with defense counsel opining to the court that the appellate division of the public defender's office would not assist because the custody credit issue was not "important enough."

It appears that at sentencing both counsel and the trial court overlooked a 1997 probation report listing a March 12, 1996 date for Ventura's deportation. As it was unaware of this document, the trial court never considered whether it was sufficient to rebut the presumption that Ventura served the full jail term to which he was sentenced. (Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].) Nor did the court make the "definitive factual determination of the credits due [the] defendant by reason of any presentence confinement" that it was "both authorized and obligated" to make, instead accepting defense counsel's calculations after both counsel asserted that the true dates of Ventura's stays in custody were unknown. (*People v. Brite* (1983) 139 Cal.App.3d 950, 955 (*Brite*).)

Although the "failure to make express findings of custody dates is not prejudicial where . . . the dates appear in the probation officer's report and were not disputed" (*Blunt*, *supra*, 186 Cal.App.3d at p. 1602), here, the only report considered by the court lacked the relevant dates and rested on the probation officer's assumptions about the time Ventura had served. The dates that Ventura entered and left custody in 1996 were not un*disputed* but un*determined*—that is, counsel did not agree on the dates, they agreed that the dates could not be ascertained. We cannot review the factual and legal significance of the document listing a deportation date for Ventura because the document was not considered by the trial court—and that court cannot be deemed to have impliedly ruled on the admissibility or import of evidence of which it was quite clearly not aware, even though it was in the record at sentencing. Accordingly, we remand the matter to the trial court for the limited purpose of determining Ventura's actual custody and presentence conduct credits. (See *People v. Wischemann* (1979) 94 Cal.App.3d 162, 175 [when record on appeal "does not contain competent evidence of the duration of defendant's incarceration . . . we are unable to resolve this matter (of the proper award of

presentence custody credits), and must remand the matter to the trial court"]; see also *Brite*, *supra*, 139 Cal.App.3d at p. 955 [failure to make the factual determinations required by Section 2900.5(d) "render[s] . . . [the] resulting sentence a nullity"].)

As an additional matter, we note, and the parties agree, that the court did not impose the mandatory $50 laboratory fee set forth by Health and Safety Code section 11372.5, subdivision (a), and the resultant penalty assessments in the amounts of $50 and $35 pursuant to Penal Code section 1464, subdivision (a), and Government Code section 76000, subdivision (a). On remand, the trial court shall impose these mandatory fees and assessments. (*Talibdeen*, *supra*, 27 Cal.4th at pp. 1153-1156.)

DISPOSITION

The case is remanded to the superior court for a hearing to determine Ventura's total actual custody and presentence conduct credits. On remand, the court shall impose a $50 laboratory fee (Health & Saf. Code, § 11372.5, subd. (a)); a $50 penalty assessment (Pen. Code, § 1464, subd. (a)); and a $35 penalty assessment (Gov. Code, § 76000, subd. (a)). The clerk of the superior court is ordered to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections. In all other respects, the judgment is affirmed.

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MOSK, J.

We concur:

TURNER, P.J. ARMSTRONG, J.